

Topic 2: Maine Implementing Act Sustenance Fishing Provisions as an Explicit “Designated Use” under the Clean Water Act Applicable to the Waters in the Southern Tribes’ Reservations.

EPA’s Decision: In February 2015, EPA approved 30 M.R.S. §§ 6207(4) and (9) of MIA as a water quality standard based on the conclusion that the legally binding right for the Southern Tribes to take fish for their individual sustenance contained in those subsections establishes a designated use for inland waters in the Southern Tribes’ reservations.¹

MIA provides:

SUSTENANCE FISHING WITHIN THE INDIAN RESERVATIONS. Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.²

30 M.R.S. § 6207(4). Under this section, “fish” is defined as “a cold blooded completely aquatic vertebrate animal having permanent fins, gills and an elongated streamlined body usually covered with scales and includes inland fish and anadromous and catadromous fish when in inland water.” 30 M.R.S. § 6207(9).

EPA evaluated whether 30 M.R.S. §§ 6207(4) and (9) constitute a new or revised water quality standard, in light of the Agency’s guidance regarding how it determines what is or is not a new or revised WQS, summarized in EPA’s 2012 Frequently Asked Questions (FAQ) publication on the subject.³ As explained in the FAQ, EPA considers four questions in making this determination, and in this case, all four questions are answered in the affirmative. First, these provisions are legally binding and were established as a matter of state law. Second, they include and address one of the three core components of a water quality standard (*i.e.*, a designated use), since they articulate a specific fishing use for the specified waters. Third, they express or establish the desired condition of the waters, or level of protection afforded the waters, by specifically providing for sustenance fishing (*i.e.*, to protect sustenance fishing, the water quality must be both adequate to support healthy fish populations at levels that provide a sufficient quantity of fish to be taken for sustenance purposes, and adequate to ensure that such fish may be safely consumed at sustenance rates by tribal members.) Lastly, these provisions established a new water quality standard since they had not previously been approved by EPA.

Maine’s Position:

Ex.5 AWP / DPP / ACP

Ex.5 AWP / DPP / ACP

Ex.5 AWP / DPP / ACP

Ex.5 AWP / DPP / ACP

EPA's Response:

Ex.5 AWP / DPP / ACP

Ex.5 AWP / DPP / ACP

Ex.5 AWP / DPP / ACP

Ex.5 AWP / DPP / ACP

Ex.5 AWP / DPP / ACP

[PAGE * MERGEFORMAT]